No. 17,302

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT CHARLES CAULEY,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE

Appeal from the United States District Court for the District of Oregon.

C. E. LUCKEY,
United States Attorney,
District of Oregon,
JOSEPH E. BULEY,
Assistant United States Attorney,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 6-26-61—40

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OPINION BELOW

Because of its brevity, the opinion below is here set forth verbatim except for the case entitlement.

No. C-18435
Opinion, December 12, 1960
SOLOMON, Judge:

"Defendant filed a motion under 28 U.S.C. § 2255, to vacate the sentence of six years imposed upon defendant in 1957 for violation of the narcotics law.

There is no merit in defendant's contention that he was not properly represented at the trial. Defendant was represented by an experienced, able and conscientious lawyer, but there is a limit to what any lawyer can do for a defendant when the evidence so clearly demonstrates his guilt.

The allegations that hearsay evidence was admitted and that the failure of the informer to testify deprived defendant of his constitutional rights are equally without merit. A government agent who observed the transaction testified. There is no requirement that the government call all witnesses to a transaction or that an informer must be called to testify. The testimony of only one witness is sufficient to establish any issue in the case.

Defendant's motion is denied."

JURISDICTION

Jurisdiction of the District Court was conferred by 28 U.S.C. § 2255 and Rule 35, Federal Rules of Criminal Procedure. Jurisdiction of this Court to review the judgment of the District Court is conferred by 28 U.S.C. §§ 2255 and 1291 and Rule 37[a] Federal Rules of Criminal Procedure.

STATUTES INVOLVED

Title 28 U.S.C. § 2255.

STATEMENT OF THE CASE

The appellant was indicted August 16, 1957 for narcotics violations, said indictment being in eleven counts. Subsequent thereto he was found guilty as to all counts by a jury verdict on September 16, 1957. On September 17, 1957 he was sentenced to a term of six years to each of said counts, said terms of imprisonment to run concurrently, and also that he pay a fine of $11.00. In November of 1960, appellant filed a Motion to Vacate Sentence and Judgment under 28 U.S.C. § 2255. Thereafter, on December 12, 1960, The Honorable Gus J. Solomon, Chief Judge of the United States District Court of the District of Oregon, denied said motion. His motion to the District Court to proceed *in forma pauperis* to obtain a transcript was denied, and his appeal to this Court to proceed *in forma pauperis* was also denied.

QUESTIONS PRESENTED

Apparently appellant raises the following questions:

(1) That the evidence was insufficient to convict;

(2) That he was represented by incompetent counsel at time of trial;

(3) That the officers had no warrant of arrest at the time he was arrested and searched.

ARGUMENT

I.

Was the Evidence Sufficient to Convict the Appellant?

The insufficiency or incredibility of evidence is not properly raised by the appellant's motion. As is said in *Black* v. *United States* (C.A. 9, 1959), 259 F.2d 38, cert. den. 80 S. Ct. 379, 361 U.S. 938, 4 L. Ed. 2d 357:

> "A sentence is not ordinarily subject to collateral attack in a § 2255 proceeding for errors of law which could have been corrected by an appeal."

The *Black* case therefore would seem to dispose of most of the appellant's complaints. However it is interesting to note that he refers to hearsay evidence although in his original motion he states that one of the agents saw the sales of narcotics to the informant. This could hardly be classed as hearsay evidence. As the District Court indicated there appears to be no requirement that the Federal officer's testimony be corroborated. Appellant also suggests that he should have been arrested during the course of one of the transactions. There is no requirement that the arrest be made at a particular given time, and it is submitted that there are several possible reasons for the delay of the arrest of the defendant. One reason may have been that the officers were endeavoring to make other sales involving this appellant, and also it could well be that they desired to continue to use the special employee as long as possible before his identity might be disclosed. Appellant also questions whether or not

the evidence found outside an apartment building could be used against him at the time of trial. Again it would seem that the *Black* case has the answer to this same problem and that in any event the evidence was quite probably admissible, although there might be some question of the weight of such evidence. Without a transcript of the evidence we have no way at this time of knowing the full story. For instance, were the appellant's fingerprints found on the evidence obtained outside his apartment? We submit that as to these items his proper procedure would have been by way of appeal and not by way of a proceeding of this type.

II.

Denial of Competent Counsel

Again the *Black* case would seem to dispose of this contention in that it is there stated:

> "This is not a ground for relief under Section 2255 unless it is shown that the attorney's conduct was so incompetent that it made the trial a farce, requiring the court to intervene in behalf of the client. *Latimer* v. *Crainor,* 9 Cir., 214 F.2d 926, 929. In denying the instant Section 2255 motion the District Court found that the conduct of Black's counsel at the trial 'was that of a skillful and experienced lawyer.' Our reading of the record confirms this view."

In this case the District Court found that the defendant was represented by an experienced, able and conscientious lawyer. This would therefore seem to dispose of this problem. See also *Kenneth J. McDonald* v. *U. S.* (9 Cir., 1960), 282 F.2d 737. Particularly

is this true when we do not have a transcript of the evidence and remarks made at the time of trial. In that regard the appellant complains that the informer was not produced. It is submitted that the appellant had ample time to ascertain the informant's whereabouts and obtain a deposition if he so desired prior to time of trial, rather than raising that question on the morning of trial. Also there is no reason to believe that the informer's testimony would have aided the appellant's cause in any manner. There was no showing that the government in any way prevented the informer from appearing. Apparently from the appellant's own statements in this proceeding the informer was in prison in Canada and therefore could obviously not have appeared at the time of trial. Again, we submit that this is another instance that his proper procedure would have been by way of appeal rather than by this type of proceeding.

III.

Was It Necessary that the Federal Agents Have a Warrant for the Arrest of the Appellant?

Again the *Black* case holds that such a contention is inappropriate in this type of proceeding but should have been raised by way of appeal. Also the case *Draper* v. *United States* (1959), 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 327, clearly holds that a warrant of arrest is not necessary for a Federal Narcotics Agent to make an arrest. Beyond that it is hard to understand how the appellant reasons that he is now entitled to have his sentence vacated when from his own

statements he says that no evidence was found in his residence or in his automobile. Therefore it is hard to understand how he could have been prejudiced at time of trial if such were true. Also in this regard it does not seem that it is necessary for the Court to answer the question as to whether or not the Federal Agents had the right to seize the appellant's automobile. It would appear from his own statements that the Federal Narcotics Agents had probable cause to arrest the appellant without a warrant in that the agent had viewed sales between the Special Employee and this appellant through holes in a door.

CONCLUSION

From the contentions made by the appellant, and although there is no transcript of the evidence of the trial, it fully appears that the District Court's summary dismissal of the appellant's Motion to Vacate Sentence and Judgment was proper and that the Court's order should be upheld.

It is respectfully submitted, therefore, that appellant's appeal herein should be dismissed, or, in the alternative, the District Court's summary dismissal of the motion should be affirmed.

C. E. Luckey,
United States Attorney,
District of Oregon,

Joseph E. Buley,
Assistant United States Attorney,
Attorneys for Appellee.